



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 215, 216, 233, and 252

[Docket DARS-2021-0010]

RIN 0750-AJ73

Defense Federal Acquisition Regulation Supplement: Postaward Debriefings (DFARS Case 2018-D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides enhanced postaward debriefing rights under negotiated contracts, task orders, and delivery orders.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D009, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>.

Search for "DFARS Case 2018-D009". Select "Comment Now" and follow the instructions provided to submit a Comment. Please include "DFARS Case 2018-D009" on any attached documents.

o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2018-D009 in the subject line of the message.

o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Ziegler, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 818 amends 10 U.S.C. 2305 to enhance postaward debriefing rights for competitive negotiated contracts, task orders, and delivery orders that exceed \$10 million and to provide offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive agency responses. Section 818 also amends 31 U.S.C. 3553(d) to extend the timeframe during which the contracting officer shall immediately suspend contract performance or terminate the awarded contract

if a protest is filed. Section 818(a)(4) requires robust procedures, consistent with 10 U.S.C. 2305(b)(5)(D), that must preclude point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under 5 U.S.C. 552(b). There is sufficient existing policy in FAR 3.104-4, Disclosure, protection, and marking of contractor bid or proposal information and source selection information; therefore, no additional DFARS changes are required in this regard.

II. Discussion and Analysis

The following changes to the DFARS are proposed to implement section 818 of the NDAA for FY 2018:

DFARS 215.506 implements new requirements for contracting officers when providing postaward debriefings, stipulating the requirements for information to be provided to successful and unsuccessful offerors. DFARS 215.506(S-70) outlines the debriefing process, which provides the opportunity for offerors to submit written follow-up questions within two business days after receiving the debriefing, as well as requirements for the agency to respond in writing to the timely submitted follow-up questions within five business days after receipt of the questions. DFARS 215.506(S-70)(2) ensures contracting officers do not consider the postaward debriefing to be concluded until the agency delivers its written response to an offeror.

DFARS 215.506(b) informs contracting officers that notwithstanding FAR 15.506(b), when requested, a written or oral

debriefing is required for all contracts valued at \$10 million or more.

DFARS 215.506(d)(i) and (ii) specify the following: (1) for contract awards in excess of \$10 million, and not in excess of \$100 million, with a small business or nontraditional defense contractor (as defined in DFARS 201.101), the debriefing information must include the option for a small business or nontraditional defense contractor to request the disclosure of the written source selection decision document, redacted to protect the confidential and proprietary information of other offerors; and (2) for the award of a contract in excess of \$100 million, the debriefing information must include the disclosure of the written source selection decision document, redacted accordingly.

DFARS 216.505(b)(6) informs contracting officers that, in addition to the notice required at FAR 16.505(b)(6), a written or oral debriefing is required for task and delivery orders valued at \$10 million or more. Paragraph (b)(6)(ii) directs contracting officers to follow the procedures in DFARS 215.506 when providing postaward debriefings to successful and unsuccessful awardees for task or delivery orders valued at \$10 million or more.

Paragraph (c)(1) in DFARS 233.104, notifies contracting officers of the new timeframes for the suspension of performance or termination of a contract, task order, or delivery order awarded, upon notification from the General Accountability

Office (GAO) of a protest filed within the following time periods, whichever is later:

- Within 10 days after the date of contract award or the issuance of a task or delivery order, where the value of the order exceeds \$25 million.
- Within 5 days after the date that is offered to an unsuccessful offeror for a debriefing that is requested, and when requested is required, and the unsuccessful offeror submits no additional questions related to the debriefing.
- Within 5 days after the date that is offered to an unsuccessful offeror for a debriefing that is requested, and when requested is required, if the debriefing date offered is not accepted.
- Within 5 days, commencing on the day the Government delivers its written response to additional questions timely submitted by the unsuccessful offeror, when a requested and required debriefing is held on the date offered.

A new solicitation provision is added at DFARS 252.215-70XX, Notification to Offerors—Postaward Debriefings, for use in competitive negotiated solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items. The solicitation provision informs offerors of the new enhanced postaward debriefing requirements for contracts valued at \$10 million or higher. The prescription for the provision is added at DFARS 215.570. The provision is also listed at DFARS 212.301(f)(vi) for use in the acquisition of commercial items.

The proposed rule adds a new contract clause at DFARS 252.216-70YY, Postaward Debriefings for Task Orders and Delivery Orders, for use in multiple-award contracts. The clause informs multiple-award contractors of the new enhanced postaward debriefing requirements for task orders and delivery orders. The clause is prescribed in paragraph (S-71) at DFARS 216.506 and is listed at DFARS 212.301, new paragraph (f)(vii), for use in the acquisition of commercial items.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule implements section 818 of the NDAA for FY 2018. Section 818 requires that DoD provide successful and unsuccessful offerors the opportunity for enhanced postaward debriefings. The rule adds one new solicitation provision at 252.215-70XX, Notification to Offerors—Postaward Debriefings, for use in competitive negotiated solicitations, and one new contract clause at 252.216-70YY, Postaward Debriefings for Task Orders and Delivery Orders, for use in multiple-award contracts.

DoD does not intend to apply this rule to contracts and subcontracts valued at or below the SAT. DoD intends to apply this rule to commercial items, including COTS items, for the reasons described in section III.C. of this preamble.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT)

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory (FAR) Council makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to

delegations of authority from USD(A&S), the Principal Director, DPC is the appropriate authority to make this determination.

C. Determination

DoD is proposing to not apply the requirements of section 818 to contracts at or below the SAT, since the requirements apply to contracts valued at \$10 million or higher. The section 818 requirements will apply to negotiated procurements and contracts for the acquisition of commercial items, including COTS items.

DoD plans to make a determination to apply this statute to acquisitions for commercial items, including COTS items. It is not in the best interest of the Federal Government to exempt application of this rule to commercial items, including COTS items, for the following reasons. Implementation of section 818 affords offerors the opportunity for enhanced postaward debriefings for contracts and task or delivery orders that exceed \$10 million. Implementation provides offerors the opportunity, upon receiving a postaward debriefing, to submit follow-up questions related to the debriefing and to receive agency responses. These enhanced postaward debriefing requirements will assist in developing small business capabilities, provide increased participation, and promote competition. Properly conducted postaward debriefings with this enhanced transparency may minimize the number of unnecessary protests filed while strengthening relationships between DoD and industry.

Applying these requirements to the acquisition of commercial items does not increase the burden on offerors, since the rule only enhances existing requirements concerning postaward debriefings. Exclusion of acquisitions of commercial items, including COTS items, would greatly limit access to the benefits afforded to successful and unsuccessful offerors by the section 818 requirements.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller

General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule implements requirements primarily for the Government. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 818 provides offerors and contractors with significantly enhanced written or oral debriefing information for negotiated contracts and task or delivery orders that exceed \$100 million, and the opportunity for small entities and nontraditional contractors to obtain such information for awards that exceed \$10 million, but do not exceed \$100 million, with small entities and nontraditional contractors.

The objective of this proposed rule is to ensure contractors and offerors are provided a standard written or oral postaward debriefing at the dollar thresholds in the statute, while protecting the confidential and proprietary information of other offerors. The statute also provides direction to contracting

officers when notified that a protest has been received by the Government Accountability Office. The legal basis for the rule is section 818 of the NDAA for FY 2018 (Pub. L. 115-91).

The enhanced ability to obtain source selection information for actions over \$10 million by submitting questions is voluntary. The rule is expected to have a beneficial impact on small entities by increasing the transparency of the award decision process. Obtaining such additional information may be helpful to entities competing on future actions.

Data obtained from the Federal Procurement Data System for FY 2018, 2019, and 2020 indicate that DoD awarded an average of approximately 5,534 negotiated awards and delivery or task orders per year valued between \$10 and \$100 million. Of those actions, an average of 3,994 were awarded to approximately 1,543 unique small entities and 1,311 nontraditional contractors. Based upon that data, approximately 1,543 unique small entities will have the opportunity to request and obtain enhanced debriefing information if desired.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the requirements of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D009), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 215, 216, 233, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 215, 216, 233, and 252 are proposed to be amended as follows:

1. The authority citation for parts 212, 215, 216, 233, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by—

- a. Adding paragraph (f) (vi) (F);
- b. Redesignating paragraph (f) (xviii) as (f) (xvii);

c. Redesignating paragraphs (f)(vii) through (xviii) as (f)(viii) through (xix); and

d. Adding new paragraph (f)(vii).

The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(F) Use the provision at 252.215-70XX, Notification to Offerors—Postaward Debriefings, as prescribed in 215.570, to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(vii) *Part 216—Types of Contracts.* Use the clause at 252.216-70YY, Postaward Debriefings for Task Orders and Delivery Orders, as prescribed in 216.506(S-71), to comply with section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

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PART 215—CONTRACTING BY NEGOTIATION

3. Amend section 215.506 by—

a. Adding paragraphs (b) and (d); and

b. Adding paragraph (S-70) to follow paragraph (e).

The additions read as follows:

215.506 Postaward debriefing of offerors.

(b) Notwithstanding FAR 15.506(b), when requested, a written or oral debriefing is required when awarding a contract valued at \$10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(d) In addition to the requirements of FAR 15.506(d), the minimum debriefing information shall include the following:

(i) For award of a contract in excess of \$10 million and not in excess of \$100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For award of a contract in excess of \$100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

* * * * *

(S-70) When providing a required postaward debriefing to successful and unsuccessful offerors, contracting officers shall—

(1) Provide an opportunity to submit additional written questions related to the required debriefing within 2 business days after receiving the debriefing; the agency shall respond in writing to timely submitted additional questions within 5 business days after receipt of the questions; and

(2) Not consider the postaward debriefing to be concluded until—

(i) After the second business day after delivering the debriefing, if no additional questions are received; or

(ii) The agency delivers its written responses to timely submitted additional questions.

4. Add section 215.570 to subpart 215.5 to read as follows:

215.570 Solicitation provision.

Use the provision at 252.215-70XX, Notification to Offerors—Postaward Debriefings, in competitive negotiated solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

PART 216—TYPES OF CONTRACTS

5. Amend section 216.505 by adding paragraphs (b) (6) introductory text and (b) (6) (ii) to read as follows:

216.505 Ordering.

(b) * * *

(6) *Postaward notices and debriefing of awardees for orders exceeding \$6 million.* In addition to the notice required at FAR 16.505(b) (6), a written or oral postaward debriefing of successful and unsuccessful awardees is required for task orders and delivery orders valued at \$10 million or higher (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(ii) Follow the procedures at 215.506 when providing the postaward debriefing to successful and unsuccessful awardees

for task orders or delivery orders valued at \$10 million or higher.

6. Amend section 216.506 by adding paragraph (S-71) to read as follows:

216.506 Solicitation provisions and contract clauses.

* * * * *

(S-71) Use the clause at 252.216-70YY, Postaward Debriefings for Task Orders and Delivery Orders, in competitive negotiated solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when a multiple-award contract is contemplated.

PART 233—PROTESTS, DISPUTES, AND APPEALS

233.102 [Amended]

7. Amend section 233.102 by removing "Government Accountability Office" and adding "Government Accountability Office (GAO)" in its place.

8. Add section 233.104 to subpart 233.1 to read as follows:

233.104 Protests to GAO.

(c)(1) In lieu of the time periods in FAR 33.104(c)(1), contracting officers shall immediately suspend performance or terminate the awarded contract, task order, or delivery order upon notice from the GAO of a protest filed within the time periods listed below, whichever is later, except as provided in FAR 33.104(c)(2) and (3)–

(A) Within 10 days after the date of awarding a contract or issuing a task order or delivery order, where the value of the order exceeds \$25 million (10 U.S.C. 2304c(e));

(B) Within 5 days after the date that was offered to an unsuccessful offeror for a debriefing that is requested, and when requested is required, and the unsuccessful offeror submits no additional questions related to the debriefing;

(C) Within 5 days after the date that was offered to an unsuccessful offeror for a debriefing that is requested, and when requested is required, if the debriefing date offered is not accepted; or

(D) Within 5 days commencing on the day the Government delivers its written response to additional questions timely submitted by the unsuccessful offeror, when a requested and required debriefing is held on the date offered (31 U.S.C. 3553).

233.171 [Amended]

9. Amend section 233.171 by removing "Government Accountability Office" and adding "GAO" in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Add section 252.215-70XX to read as follows:

252.215-70XX Notification to Offerors—Postaward Debriefings.

As prescribed in 215.570, use the following provision:

NOTIFICATION TO OFFERORS—POSTAWARD DEBRIEFINGS (DATE)

(a) *Definition.* As used in this provision—

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

(b) *Postaward debriefing.* (1) Upon timely request, the Government will provide a written or oral postaward debriefing for contracts valued at \$10 million or higher to the Offeror, while protecting the confidential and proprietary information of other offerors. The request is considered timely if requested within 3 days of notification of contract award.

(2) When required, the minimum postaward debriefing information will include the following:

(i) For contracts in excess of \$10 million and not in excess of \$100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For contracts in excess of \$100 million, disclosure of the agency's written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(3) If a postaward debriefing is provided—

(i) The debriefed Offeror may submit additional written questions related to the required and provided debriefing within 2 business days after receiving the debriefing; the agency will respond in writing to timely submitted additional questions within 5 business days after receipt; and

(ii) The postaward debriefing will not be considered to be concluded until—

(A) After the second business day after the agency delivered the debriefing, if no additional written questions were submitted by the debriefed Offeror, or

(B) The agency delivers its written responses to timely submitted additional questions.

(c) *Contract performance.* The Government may suspend performance of or terminate the awarded contract upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (c)(1) through (4) of this provision, whichever is later:

(1) Within 10 days after the date of contract award.

(2) Within 5 days after the offered date for a debriefing to an unsuccessful offeror that is timely requested, and when requested is required, if the unsuccessful offeror submits no additional questions related to the debriefing.

(3) Within 5 days after the offered date for a debriefing to an unsuccessful offeror that is timely requested, and when

requested is required, if the debriefing date offered is not accepted.

(4) Within 5 days after the Government delivers its written response to additional questions timely submitted by the unsuccessful offeror, when a requested and required debriefing is held on the date offered.

(End of provision)

11. Add section 252.216-70YY to read as follows:

252.216-70YY Postaward Debriefings for Task Orders and Delivery Orders.

As prescribed at 216.506(S-71), use the following clause:

POSTAWARD DEBRIEFINGS FOR TASK ORDERS AND DELIVERY ORDERS (DATE)

(a) *Postaward debriefing.* (1) Upon timely request, the Government will provide a written or oral postaward debriefing for task orders or delivery orders valued at \$10 million or higher to the Contractor, regardless of whether the Contractor's offer for the order was successful or unsuccessful, while protecting the confidential and proprietary information of other contractors. The request is considered timely if requested within 3 days of notification of task order or delivery order award.

(2) If a postaward debriefing is provided—

(i) The debriefed Contractor may submit additional written questions related to the required and provided debriefing within 2 business days after receiving the debriefing; the agency will respond in writing to timely

submitted additional questions within 5 business days after receipt; and

(ii) The postaward debriefing will not be considered to be concluded until—

(A) After the second business day after the agency delivered the debriefing, if no additional written questions were submitted by the debriefed Contractor; or

(B) The agency delivers its written responses to timely submitted additional questions.

(b) *Task order or delivery order performance.* The Government may suspend performance of or terminate the awarded task order or delivery order, upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (b) (1) through (4) of this clause, whichever is later:

(1) Within 10 days after the date of issuance of a task order or delivery order, where the value of the order exceeds \$25 million (10 U.S.C. 2304c(e)).

(2) Within 5 days after the offered date for a debriefing to an unsuccessful contractor that is timely requested, and when requested is required, if the unsuccessful contractor submits no additional questions related to the debriefing.

(3) Within 5 days after the offered date for a debriefing to an unsuccessful contractor that is timely requested, and when requested is required, if the debriefing date offered is not accepted.

(4) Within 5 days after the Government delivers its written response to additional questions timely submitted by the unsuccessful contractor, when a requested and required debriefing is held on the date offered (31 U.S.C. 3553).

(End of clause)

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